

1 inventors knew or didn't know and what they said and  
2 didn't say to the Patent Office. Only Mr. Berrian and  
3 his fellow inventors can testify about that.

4 THE COURT: Well, this is helpful. It's taken a  
5 while to get this hearing scheduled. But as I've said, I  
6 always aim to decide these matters while they're in clear  
7 focus and, therefore, I will.

8 The arguments today have certainly tested my  
9 tentative views and caused me to refine them somewhat,  
10 but they haven't altered them. And so, for the reasons  
11 I'll describe, the motion to dismiss for lack of personal  
12 jurisdiction is denied. The motion to transfer this case  
13 to the Central District of California is allowed.

14 There are a lot of facts that I could recite.  
15 They are familiar to the parties. And I think I'll just  
16 refer to them as necessary in the course of the analysis.

17 But, essentially, it seems to me that while it's  
18 a close case, in view of the applicable standard, there's  
19 sufficient information to establish personal jurisdiction  
20 for present purposes, although also a meaningful question  
21 as to whether personal jurisdiction could be established  
22 at summary judgment or at trial.

23 With regard to the standard for determining  
24 personal jurisdiction as applicable to this case, my  
25 understanding is that the law of the Federal Circuit

1 applies.

2 The Massachusetts Long Arm statute,  
3 Massachusetts General Law, chapter 223A, section 3, which  
4 among other things provides personal jurisdiction in  
5 cases arising out of the transaction of business in  
6 Massachusetts has been interpreted by our Supreme  
7 Judicial Court to be coextensive with the limit of  
8 federal due process. That's Automatic Sprinkler Corp,  
9 361 Mass 441.

10 So, essentially, I have to decide whether the  
11 plaintiff has provided sufficient information to  
12 establish the necessary minimum contacts and also whether  
13 the defendant has proven at this point that the assertion  
14 of jurisdiction does not comport with fair play and  
15 substantial justice.

16 I have to accept the uncontroverted allegations  
17 in the complaint as true and resolve any factual  
18 conflicts in the affidavits in plaintiffs' favor, as the  
19 Federal Circuit explained in Electronics for Imaging,  
20 Inc, 340 F 3rd 1344 at 1349.

21 When, as here, absent discovery, that is, when  
22 no discovery has occurred, plaintiff only has to  
23 establish a prima facie case, and that low standard has  
24 been met.

25 The plaintiffs' best argument is for specific

1 jurisdiction, that is, its allegations that this suit  
2 arises out of contacts with Massachusetts by the  
3 defendant, Time & Temperature Company, also known as TNT.

4 Accepting the plaintiffs' affidavit as true, the  
5 defendant purposely directed activities to Massachusetts  
6 residents, and the claims of patent infringement in this  
7 case arise out of that activity.

8 Plaintiffs' affidavit asserts that defendant  
9 attempts to get its receivers which, like plaintiffs'  
10 product, will record changes in temperatures as produce  
11 travels across the country to purchasers of produce in  
12 Massachusetts as well as elsewhere and that the defendant  
13 seeks to get those purchasers of produce to authorize or  
14 require the use of the defendant's monitors in shipments  
15 to it.

16 The plaintiff has identified five Massachusetts  
17 accounts on the list that the defendant faxed to shippers  
18 to remind them to use TNT monitors. More specifically,  
19 Sensitech states on information and belief, which in view  
20 of the actual facts I find sufficient in the present  
21 circumstances, that TNT has direct arrangements with  
22 receivers of produce in Massachusetts and that those  
23 receivers require their shippers to use TNT monitors.

24 In support of this assertion, Sensitech has  
25 submitted a list of Smart Check, defendant's products

1 users, which TNT faxed to shippers on March 22, 2002, as  
2 a reminder that shippers should use TNT monitors when  
3 shipping to the listed companies. That's exhibit A to  
4 the Vaught declaration.

5 The fax instructs shippers to check this list  
6 for your customers who request Smart Check digital  
7 recorders. Sensitech identifies five Massachusetts  
8 accounts on the list, suggesting that these companies  
9 require their shippers to use TNT Smart Check digital  
10 monitors.

11 The five accounts are Alphas Chelsea, Mass; Big  
12 Y Foods, Mass; C & S Wholesale, Mass; Community Suffolk,  
13 Mass; and Shaw's Supermarket.

14 Sensitech also submitted an April 4, 2002 letter  
15 from TNT sales manager to a potential receiver of  
16 perishable goods. The letter describes TNT's Smart Check  
17 program and identifies C & S and Shaw's as among TNT's  
18 accounts. That's the Vaught declaration, exhibit B.

19 Sensitech estimates that solely as a result of  
20 TNT's account with Shaw's, TNT annually sold between  
21 1,000 and 1500 monitors for use in Massachusetts. Thus,  
22 according to Sensitech, although TNT only sells a small  
23 number of monitors to purchasers in Massachusetts, it  
24 nevertheless indirectly markets larger numbers of  
25 monitors for use in Massachusetts through its

1 relationships with local receivers.

2 Sensitech essentially speculates that in  
3 connection with the Smart Check program, TNT possesses  
4 records showing marketing efforts toward Massachusetts,  
5 documentation of sales calls to Massachusetts, receivers,  
6 and records showing monitors returned to TNT from  
7 Massachusetts receivers.

8 Sensitech also suggests that TNT has probably  
9 provided Massachusetts companies with computing equipment  
10 related to Smart Check monitors and with prepaid boxes to  
11 facilitate the return of monitors.

12 TNT admits it provides at least a hundred  
13 monitors for use in Massachusetts in connection with its  
14 relationship with Alphas Chelsea, which the defendant  
15 solicited. I believe that those regular sales are agreed  
16 to be the result of direct marketing efforts, and they  
17 are a sufficient basis upon which to find purposeful  
18 availment.

19 The affidavit and allegations suffice for  
20 present purposes to show that the defendant offered  
21 allegedly infringing products in Massachusetts and sold  
22 some here. Cases like Maxwell Chase, 79 F Supp 2nd 1364  
23 at 1372 to 73, indicate that that's sufficient.

24 Sensitech's claims of patent infringement arise  
25 out of this alleged activity. The defendants have not

1 shown that it would be so unfair or unreasonable to  
2 require it to litigate here that due process would be  
3 violated. But this is a close question, considerably  
4 closer than in many cases.

5 As I said, if the case were to continue here,  
6 given the number of allegations on information and  
7 belief, I would be inclined to require phase discovery to  
8 try to resolve the summary judgment issue on -- I'm  
9 sorry, try to resolve the personal jurisdiction issue on  
10 summary judgment.

11 However, I have decided that it's most  
12 appropriate to transfer this case to the Central District  
13 of California pursuant to 28 United States Code, section  
14 1404A.

15 1404A provides that in the convenience of the  
16 parties and the witnesses and the interest of justice, a  
17 District Court may transfer any civil action to any other  
18 district or division where it might have been brought.  
19 Decisions to transfer under 1404A are left to the  
20 discretion of the trial court, as the First Circuit said  
21 in Codex Corporation, 553 F 2nd 735 at 737, and as  
22 Professors Wright & Miller write in section 384-7 of  
23 their treatise.

24 In a patent case like this one, transfer venue  
25 is procedural in matter and, therefore, the Federal

1 Circuit applies the law of the regional circuit review of  
2 the transfer order, as it held in Winner International,  
3 202 F 3rd 1340 at 1352.

4 There is a presumption in favor of the  
5 plaintiff's selection of forum. It is a presumption that  
6 gets differing weight, depending on the circumstances of  
7 the case. I've given that presumption to the plaintiff,  
8 but I find that it's overcome here.

9 Among other things, the information not disputed  
10 before me now indicates that the plaintiff tried to buy  
11 the defendant. It sued about two years later. As I  
12 said, I've expressed some concern about the bare bones  
13 nature of the complaint. It does not name, for example,  
14 any alleged infringing product nor give any guidance as  
15 to why it's infringing.

16 The evidence indicates that the plaintiff has a  
17 very large market share, perhaps as much as 85 to 90  
18 percent with regard to one of the products at issue, and  
19 has sued another competitor that bought the competitor.

20 There is a risk that I can't fully assess here  
21 that this is a case brought by a larger company against a  
22 considerably smaller competitor that is intended to be  
23 burdensome for that competitor.

24 Massachusetts is a more convenient forum for the  
25 plaintiff and for some of the potential third party

1 witnesses. I have a question that I can't really answer  
2 as to how important the testimony of third-party  
3 witnesses in Massachusetts would be, because I haven't  
4 seen the actual defenses yet. But I assume that they  
5 have some testimony that it would be most convenient for  
6 them to give in Massachusetts.

7           However, the plaintiff has an office in Fresno,  
8 California, which is in the Central District of  
9 California. It has, I think, two other offices elsewhere  
10 in California. Most of the plaintiffs' customers are in  
11 California, according to the record. The plaintiff  
12 regularly does business in California and I find can,  
13 without undo convenience, litigate there, if necessary.

14           The defendant has no office or employees in  
15 Massachusetts. It has third-party witnesses who, it  
16 seems to me at this point, would have admissible evidence  
17 with regard to the way that its devices are structured  
18 and function. Its employee witnesses are in California.  
19 It has more limited means to litigate in Massachusetts.  
20 So the balance of hardship, I find, favors the defendant.  
21 But I'd say most important to me is it seems to me that  
22 the third-party witnesses who are likely to be  
23 unavailable for trial appear to be in California rather  
24 than in Massachusetts, and this is a major consideration,  
25 as I said in my Brant Point decision, 671 F Supp 3.



1           In addition, as the Supreme Court has held, the  
2       public interest factors of systemic integrity and  
3       fairness, in addition to private concerns, are part of  
4       the administration of justice. That's Stewart  
5       Organization, 487 US 22 at 30.

6           Here, as I said, the plaintiff tried to buy a  
7       much smaller competitor, failed, waited two years, and  
8       then sued for alleged patent infringement without  
9       identifying the alleged infringing product or products.

10          The personal jurisdiction issue may -- well,  
11       personal jurisdiction over the defendant may on summary  
12       judgment prove not to exist in Massachusetts. As I said  
13       earlier, it's possible in this case, if I were keeping  
14       it, that I would phase discovery. I think, I find it's  
15       most fair and efficient in the interest of justice to  
16       send this case to the Central District of California  
17       where the defendant has filed an antitrust case that can  
18       be joined with this one. There should be no questions of  
19       jurisdiction, personal jurisdiction to impede its  
20       progress, and the parties can get a resolution on the  
21       merits.

22          So I will enter an order just memorializing  
23       those conclusions. If the parties would like a record of  
24       the decision, they can order the transcript.

25          Court is in recess.

CERTIFICATE

I, JUDITH A. TWOMEY, RPR, Official Court Reporter for the United States District Court, District of Massachusetts, do hereby certify that the foregoing transcript, pages 1 through 42 inclusive, was taken by me stenographically and thereafter by me reduced to transcription and is a true record of the proceedings in the above-entitled matter to the best of my ability.

JUDITH A. TWOMEY, RPR  
Official Court Reporter

EXH B

4

1 standard right, I'd have to treat it as if it really is  
2 five for present purposes, although it seems to me that  
3 personal jurisdiction is a sufficiently close question  
4 and, if the case is not dismissed and stays here, whether  
5 there should be phased discovery and summary judgment on  
6 that issue is a question to be addressed.

7 But I do at the moment tend to think that  
8 there's barely enough to, for present purposes, establish  
9 personal jurisdiction. In part because it is such a  
10 close question and in part for other reasons, I'm willing  
11 to seriously consider the transfer. I know that  
12 frequently -- well, I know that the plaintiffs' choice of  
13 forum deserves some weight, but that weight varies in the  
14 circumstances.

15 I frankly wonder what this case is really about.  
16 I don't think I've ever seen a more sparse complaint. I  
17 have concerns about whether it satisfies the requirements  
18 of notice pleading. If I've read it right, it doesn't  
19 allege what the infringing devices are or what ways in  
20 which they infringe.

21 And my sense is that the relative resources of  
22 the parties are different, and I'm concerned that it  
23 might be most fair and efficient if this case is going to  
24 proceed to have it proceed in California rather than  
25 disappear on personal jurisdiction on summary judgment.

1 Circuit applies the law of the regional circuit review of  
2 the transfer order, as it held in Winner International,  
3 202 F 3rd 1340 at 1352.

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5 plaintiff's selection of forum. It is a presumption that  
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